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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of S. and STEVEN J.	
S.J., Respondent, v. STEVEN J., Appellant.	F075636 (Super. Ct. No. 12FL0710) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Julienne L. Rynda, Commissioner.

Kliever Law Group and Cindy Crose Kliever for Appellant.

Christine J. Levin for Respondent.

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In this dissolution proceeding, S.J. (mother) requested that she be allowed to move with the parties' child to her native country, Italy. Steven J. (father) objected and sought sole custody. After a lengthy trial of the issue, the trial court granted mother's request with specified conditions, and granted father visitation. Father appeals, contending the judgment did not adequately ensure that the California order would remain in effect, and

mother would comply with it, after the move to Italy. We find no error by the trial court and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother is from Italy. Father is an active duty member of the United States military. They met in London in 2000, then kept in touch and visited each other in the United States and other countries. In 2007, the parties married in Florida, then lived in North Carolina, where father was stationed. In 2010, father was transferred to California. The parties' child was born in California a few months later. Mother stayed home with the child and was the child's primary caretaker.

In December 2012, mother filed a petition for dissolution of the marriage in the Superior Court of Kings County. She also requested permission to move with the child to Italy, where mother's family resided. Father opposed the move-away request and sought sole physical and sole legal custody of the child. The trial court granted the parties temporary joint legal custody of the child; it granted mother temporary sole physical custody with visitation for father. In March 2013, father was transferred back to North Carolina; mother remained in Kings County with the child. In March 2016, father voluntarily transferred to Arizona to be closer to the child.

The trial of mother's move-away request and the custody issues was heard over the course of almost a year. Child custody counseling recommendations were prepared by two child custody counselors and admitted into evidence at trial. Each counselor recommended the child be permitted to move to Italy with mother, and father be allowed visitation. Father expressed concerns about whether his visitation rights would be enforceable under Italian or international law if mother moved the child to Italy. He was also concerned mother might not cooperate in delivering the child for visitation or might take the child across borders into other European countries where he would be unable to enforce his visitation rights.

After considering the best interests of the child, the trial court granted mother's request to be permitted to move with the child to Italy. It granted the parties joint legal custody and granted mother sole physical custody. It imposed conditions on the move to Italy, including that mother have the judgment transcribed into Italian and registered in Italy, that she maintain a child custody enforcement bond of $8,000, and that she enroll the child in a bilingual school where she would learn both English and Italian. The judgment provided that California would maintain jurisdiction of custody and visitation issues, subject to provisions of California law, Italian law, and the Hague Convention on the Civil Aspects of International Child Abduction (October 25, 1980, T.I.A.S. No. 11670) (Convention). Father appeals from the judgment.

DISCUSSION

I. Standard of Review

"It is well settled that the standard of review for custody and visitation orders, including move-away orders, is whether the trial court abused its discretion." (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 714.) "The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) " 'The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law.' " (*Kayne v. The Grande Holdings Limited* (2011) 198 Cal.App.4th 1470, 1474–1475.) In child custody cases, "[g]enerally, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child." (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15.) An abuse of discretion may also be found when the trial court applied improper criteria or made incorrect legal assumptions. (*Ibid.*) "When applying the deferential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is

reversible only if arbitrary and capricious.' " (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

II. Relocation of Parent with Child

The trial court is authorized to make "an order for the custody of a child during minority that seems necessary or proper." (Fam. Code, § 3022.)[1] The primary consideration in making an initial custody decision is the best interests of the child. (§ 3020, subd. (a); *In re Marriage of Loyd* (2003) 106 Cal.App.4th 754, 758.) It is well settled "that the best interest and the welfare of the child should be evaluated and determined in light of the fullest possible inquiry into the facts, circumstances and environment of the contesting parties." (*In re Marriage of Kern* (1978) 87 Cal.App.3d 402, 410.) "In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.' [Citation.] It must look to *all the circumstances* bearing on the best interest of the minor child." (*Burgess, supra,* 13 Cal.4th at pp. 31–32.) This includes the health, safety, and welfare of the child, any history of abuse by one parent against the other or against the child, and the nature and amount of contact with both parents. (§ 3011; *Burgess, supra,* 13 Cal.4th at p. 32.)

When the parent who has physical custody of the child proposes moving away with the child, "the court must also consider 'the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare. [Citation.] Accordingly, in considering all the circumstances affecting the "best interest" of minor children, it may consider any effects of such relocation on their rights or welfare.' " (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1087.) Additional factors for the trial court to consider in fashioning a custody order in a move-away case include: "the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children;

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[1] All further statutory references are to the Family Code unless otherwise indicated.

the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*Id*. at p. 1101.) The trial court must consider the effects of relocation on the best interests of the child. (*F.T. v. L.J.*, *supra*, 194 Cal.App.4th at p. 21.)

A. Trial court's judgment

In its judgment, the trial court found mother was the child's primary caregiver, both before and after the parties' separation. She was "solely focused on the best interests and upbringing" of the child. The trial court also found father has a bond with the child and has exercised his visitation rights. It noted that, during the pendency of this action, mother had not returned to Italy, because an order prohibited the child's travel outside the United States. Regarding father's fear that, if mother and the child move to Italy, mother might abscond with the child to another country that is not subject to the Convention, the trial court stated: "It does not appear to the Court that [mother] is inclined to hide or otherwise interfere with [father's] relationship with [the child] in Europe or in the United States." "[Mother's] testimony included her detailed plans for [the child's] contact with her family in Italy and for her residential and educational needs. It does not seem likely to the Court that she would choose further separation from her family to defeat [father's] contact with [the child]."

The judgment discussed one incident of domestic violence father alleged was committed by mother, the problems the parties had in arranging visitation during the pendency of the proceedings, the recommendations of two child custody counselors that mother be granted permission to relocate with the child to Italy, the parties' level of experience with international travel, and the costs of travel to and from Italy. The trial court concluded: "It appears to the Court from all of the evidence that the child's best

interests [call] for the stability and continuity of [mother's] primary custodial role, with custodial time/visitation to [father]. The Court finds that changing the child's primary caretaker at this time would in fact be detrimental to [the child]. The Court further finds that the child's interests in that arrangement support an order allowing the child's residence to be changed from California to Italy, provided that certain conditions are met first." The conditions included having the judgment, and specifically the custody and visitation orders, transcribed by a certified court interpreter from English into Italian and registered in Italy, and posting and maintaining a surety bond with the California court in the amount of $8,000. The trial court also ordered that, "as a reasonable sanction for failure of [mother] to comply with the Court's custody order, [father] may keep his child support payments in trust 15 days after he files a declaration with the court alleging a violation by [mother]. The Court will retain jurisdiction over any payments placed [into] trust pursuant to this order and disposition of the same." The judgment set out the visitation schedule and ordered mother to enroll the child in a bilingual school, so the child will learn both English and Italian.

B. Domestic violence

In the trial court, father argued that mother perpetrated domestic violence against him. Both parties presented evidence at trial regarding a single incident that occurred on February 11, 2012. The trial court made findings concerning the incident, including a finding that it "was the result of mutual conduct by the parties." Father contends substantial evidence does not support that finding; he asserts the trial court should have found mother committed domestic violence and should have applied the presumption against awarding custody to her, which is set out in section 3044.

Section 3044 provides: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, … there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated

domestic violence is detrimental to the best interests of the child …. This presumption may only be rebutted by a preponderance of the evidence." (§ 3044, subd. (a).) "[A] person has 'perpetrated domestic violence' when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, … or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in behavior involving, but not limited to, threatening, striking, harassing, destroying personal property, or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings." (§ 3044, subd. (c).) Application of this presumption requires a finding by the court that one party perpetrated domestic violence. The trial court did not make such a finding.

Father contends substantial evidence does not support the finding that the incident involved mutual conduct. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.) " 'When determining whether substantial evidence is present, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies.' " (*Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1145.) We view the evidence in the light most favorable to the prevailing party. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 582.)

"An appellant challenging the sufficiency of the evidence to support the judgment must cite the evidence in the record supporting the judgment and explain why such

evidence is insufficient as a matter of law. [Citations.] An appellant who fails to cite and discuss the evidence supporting the judgment cannot demonstrate that such evidence is insufficient. The fact that there was substantial evidence in the record to support a contrary finding does not compel the conclusion that there was no substantial evidence to support the judgment." (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.)

Father does not cite and discuss the evidence supporting the trial court's finding. He discusses only hand-picked evidence that would support a contrary finding. Consequently, he has not established the insufficiency of the evidence to support the finding.

Mother testified that, on February 11, 2012, father had been helping fix the water heater. He came in the house when mother and the child were having lunch and sat down at the table. He smelled strongly of sweat and cigarette smoke, and mother asked him to wait to have lunch, or take a shower. Father did not respond, and mother repeated the request. Father told mother that, because she was complaining, he would chew tobacco and spit it in front of her face. He took the tobacco can and began to open it; mother grabbed the can in his hand. Father was too strong for her to take the can from him, and when she suddenly let go of it, father bounced against the wall behind him. He was frustrated, angry, and came toward her, yelling loudly. Mother backed away from him, scared he would hit her. To stop him yelling and coming toward her, she "just [popped] him on the groin area twice" with the back of her hand. He said, " 'Now I can finally call the police on you.' " Mother felt disappointed with herself, for letting father push her so far that she did something out of character. She became frustrated and tapped herself on the cheek twice with her right hand, with a closed fist. She apologized to father immediately. Father said he had to leave, or he would punch something or someone; he left. The following day, mother talked to father's captain and his wife; she told them what had happened the previous day and talked about the problems she and father were having.

Father testified that, when he sat down at the table for lunch on February 11, 2012, mother chastised him for smelling of smoke. He pulled a can of chewing tobacco out of his pocket and said he could use it instead of smoking, if she preferred. Mother became angry, lunged across the table, and grabbed the can of tobacco. Father stood up and kept control of the can, and mother hit him full force in the groin with her closed fist. He felt immediate pain and was sore for a week. He picked up the phone to call the base military police, and mother struck herself twice in the cheekbone full force with her fist. It immediately left a red mark and puffing of the cheek. Fearing he would be blamed for domestic abuse, father hung up the phone and left the house. Father admitted in his testimony that there were times when he and mother yelled at each other during arguments.

The trial court found:

> "The incident of Saturday morning, February 11, 2012, was the result of mutual conduct by the parties and purposefully resurrected by [father] post-separation for the primary purpose of defeating [mother's] move-away request. The parties were yelling simultaneously. Immediately following the incident, [father] was unhappy that she discussed the issue with an officer in his command and in fact told her she shouldn't have done that. Based on the events as testified to by the parties and the physical attributes of the parties, the Court does not find as credible [father's] description of injuries he suffered as the result of the incident. The Court has placed little weight on this isolated incident between the parties as it was mutual, occurred over four years ago and there are no further allegations of domestic violence."

Father argues mother "admitted to acts of violence against" father, and admitted father did not touch her during the incident. He contends these were "conclusive concession[s]" or "judicial admission[s]" that proved mother committed domestic violence against father. Father implies the trial court was required to find mother committed domestic violence based on these admissions. We disagree.

In the context of the Domestic Violence Prevention Act (§ 6200 et seq.), which authorizes restraining orders to prevent domestic violence (§§ 6220, 6320, 6340), even an

act that causes bodily injury is not necessarily an act of domestic violence. "Although section 6203 defines abuse to include an intentionally or recklessly caused bodily injury to the complainant, a finding of abuse is not mandated merely because the complainant shows he or she suffered an injury caused by the other party. Instead, fundamental and well-established principles allow a victim of physical aggression to employ reasonable force to defend his or her person or property against the aggressor, even when such reasonable force causes some bodily injury to the aggressor. The trial court properly recognized that a person who responds reasonably to an aggressor in this way does not commit abuse within the meaning of section 6203." (*In re Marriage of G*. (2017) 11 Cal.App.5th 773, 776.)

According to mother's testimony, the parties struggled over the can of chewing tobacco. After mother let go of it, father came around the table, approached her angrily, taking an aggressive stance and yelling loudly. She backed away, but he continued to approach. She was afraid he would actually hit her and struck him in the groin area to stop him coming toward her and yelling at her.

We conclude there was sufficient evidence from which the trial court could find that the parties engaged in mutual conduct, arguing and yelling loudly, and that mother struck father in the groin area to stop him approaching her aggressively and out of fear that he was going to hit her. The trial court implicitly rejected father's testimony that mother struck him "full force"; it expressly rejected his description of injuries he suffered, i.e., that the area where he was struck was red, swollen, and sore for approximately a week. We conclude there was substantial evidence to support the trial court's finding that the parties engaged in mutual conduct, and its implicit finding that mother's acts did not amount to domestic violence. Accordingly, because there was no finding that domestic violence was perpetrated by either party, the trial court did not err in not applying the section 3044 presumption.

C. The Convention

Both the United States and Italy are signatories of the Convention. The purposes of the Convention are " 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.' [Citation.] That is, the primary purpose of the Hague Convention is 'to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.' " (*Miller v. Miller* (4th Cir. 2001) 240 F.3d 392, 398 (*Miller*).) It seeks to deter abductions of children by family members "by eliminating their primary motivation for doing so. Since the goal of the abductor generally is 'to obtain a right of custody from the authorities of the country to which the child has been taken' [citation], the signatories to the Convention have agreed to 'deprive his actions of any practical or juridical consequences.' [Citation.] To this end, when a child who was habitually residing in one signatory state is wrongfully removed to, or retained in, another, [a]rticle 12 provides that the latter state 'shall order the return of the child forthwith' [citation]. Further, [a]rticle 16 provides that 'until it has been determined that the child is not to be returned under this Convention,' the judicial or administrative authorities of a signatory state 'shall not decide on the merits of rights of custody.' " (*Mozes v. Mozes* (9th Cir. 2001) 239 F.3d 1067, 1070.)

Congress implemented the Convention in the United States by enacting the International Child Abduction Remedies Act (ICARA) (22 U.S.C. § 9001 et seq.). ICARA "authorizes either a federal or a state court in which a child is located to issue an order requiring the return of that child to another signatory nation if the court first determines that the child was a habitual resident of the other nation, and that the child was wrongfully removed from the nation." (*Wipranik v. Superior Court* (1998) 63 Cal.App.4th 315, 321.) The Convention and the ICARA "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying

child custody claims." (22 U.S.C. § 9001(b)(4).) The scope of a court's inquiry under the Convention is limited to the merits of the abduction claim; the merits of any custody disputes are not in issue. (*Miller, supra*, 240 F.3d at p. 398.)

The Convention is designed to protect children from wrongful international removals or retentions. (*Wipranik v. Superior Court supra*, 63 Cal.App.4th at pp. 320–321.) "The removal or the retention of a child is to be considered wrongful where— [¶] (a) it is in breach of rights of custody attributed to a person … under the law of the State in which the child was habitually resident immediately before the removal or retention; and [¶] (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." (Convention, art. 3.) "A court applying this provision must therefore answer a series of four questions: (1) When did the removal or retention at issue take place? (2) Immediately prior to the removal or retention, in which state was the child habitually resident? (3) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual residence? (4) Was the petitioner exercising those rights at the time of the removal or retention?" (*Mozes v. Mozes*, *supra*, 239 F.3d at p. 1070.) In determining under article 3, subdivision (a) of the Convention whether the removal or retention was in breach of custody rights under the law of the place of habitual residence, "[t]he rights of custody … may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." (Convention, art. 3.)

Father makes two arguments concerning application of the Convention to this case. First, he argues that the provision of the trial court's order that California will retain jurisdiction over custody and visitation after mother's move to Italy with the child unlawfully conflicts with the Convention. Second, he asserts the trial court was incorrect in stating the Convention allows a means of enforcement of father's visitation rights, and therefore it rendered an ineffective order.

1. Jurisdiction of custody and visitation matters

Father challenges two sentences in the trial court's statement of decision, which also appear in the judgment: "At this time, and subject to provisions of California law, the Hague Convention and Italian law, the Superior Court of Kings County, California shall maintain jurisdiction over custody and visitation issues. [Mother] indicated her agreement to this court's jurisdiction." Father seems to argue that, under the Convention, the child's place of habitual residence has jurisdiction of custody and visitation matters, and the parties cannot establish jurisdiction in another place by agreement. He asserts this provision in the judgment directly conflicts with the Convention and constitutes legal error that prejudices him "by attempting to protect him with an order that falls outside the legal bounds of the Hague Convention."

Father cites *Barzilay v. Barzilay* (8th Cir. 2010) 600 F.3d 912 (*Barzilay*) for the proposition the Convention places jurisdiction of custody and visitation matters in the country of habitual residence and prevents parties from conferring jurisdiction of custody matters on some other country's courts by agreement. On that basis, he concludes the parties' agreement that the Kings County Superior Court will retain jurisdiction conflicts with binding federal law and is ineffective.

In *Barzilay*, the parties were Israeli citizens who lived and were married in Israel; their oldest child was born there. (*Barzilay*, *supra*, 600 F.3d at p. 914.) They later moved to Missouri, where their two younger children were born. (*Ibid*.) The parties divorced in Missouri and were awarded joint legal and physical custody of the children, with the mother to have primary physical custody. (*Id*. at p. 915.) The parenting plan included a "repatriation agreement" which provided that, if either party returned to Israel, voluntarily or involuntarily, the other party was to move back to Israel also, so the family would reside in the same country. (*Ibid*.) The father moved back to Israel and pressured the mother to do the same. When the mother took the children to visit Israel, the father obtained an ex parte order prohibiting removal of the children from Israel, based on the

repatriation agreement. The parties negotiated a consent judgment, allowing the mother and the children to return to Missouri, but giving them until a specified date to repatriate to Israel; the judgment provided that failure to do so would be regarded as kidnapping under the Convention. The judgment also provided the Israeli court would be the " 'sole and only international authority' " regarding custody. (*Ibid*.)

The mother returned with the children to Missouri and successfully petitioned the court there to remove the repatriation agreement from the custody decree. (*Barzilay, supra,* 600 F.3d at p. 915.) The father filed a petition under the Convention and the ICARA, alleging Israel was the children's state of habitual residence and seeking to compel them to move there. (*Id*. at p. 916.) The federal district court found the United States was the children's country of habitual residence, therefore their retention in Missouri was not wrongful. The father appealed. (*Ibid*.)

The court stated that the Convention accomplishes its goal of deterring child abduction "not by establishing any substantive law of custody, but rather by acting as a forum selection mechanism, operating on 'the principle that the child's country of "habitual residence" is "best placed to decide upon questions of custody and access." ' [Citation.] The purpose of proceedings under the Hague Convention is thus not to establish or enforce custody rights, but only 'to "provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed." ' " (*Barzilay, supra,* 600 F.3d at pp. 916–917.) The key inquiry is whether the child was wrongfully removed from the country of habitual residence or is being wrongfully retained in a country other than the country of habitual residence; the petitioner bears the burden of proving wrongful removal or retention. (*Id*. at p. 917.) "Proceedings under the Hague Convention and [the] ICARA do not reach the merits of an underlying custody dispute. [Citation.] Rather, '[t]he district court is to ascertain "only whether the removal or retention of a child was 'wrongful' under the law of the child's 'habitual residence,' and

if so, to order the return of the child to the place of … 'habitual residence' for the court there to decide the merits of the custody dispute." ' " (*Ibid*.)

The court concluded the children's country of habitual residence was the United States. (*Barzilay*, *supra*, 600 F.3d at p. 919.) The younger children had lived their whole lives in Missouri, and the oldest had lived there five years. The repatriation agreement was conditional and did not express an actual intent to move back to Israel. (*Ibid*.) The court rejected the father's argument that the repatriation agreement was an enforceable stipulation to the children's habitual residence. (*Id*. at p. 920.) "We have held that '[h]abitual residence may only be altered by a change in geography and passage of time.' [Citation.] It follows that it may not be altered by simple parental fiat. In other words, '[w]hile the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone.' [Citation.] The notion that parents can contractually determine their children's habitual residence without regard to the actual circumstances of the children is thus entirely incompatible with our precedent." (*Ibid*.) Further, the court observed: "The Convention seeks to prevent the establishment of 'artificial jurisdictional links' as a means to remove the child from the 'family and social environment in which its life has developed.' [Citation.] It is difficult to imagine a jurisdictional link more artificial than an agreement between parents stating that their child habitually resides in a country where it has never lived." (*Id*. at p. 921.)

The court noted the fundamental problem with the father's arguments: "He is trying to use the Hague Convention as a vehicle to enforce his custody rights, simply by relabeling them as stipulations of habitual residence. Regardless of how they are labeled, however, these agreements [the Missouri repatriation agreement and the Israeli consent judgment] amount to provisions relating to the custody of the children, and 'the Convention is certainly not a treaty on the recognition and enforcement of decisions on custody.' " (*Barzilay*, *supra*, 600 F.3d at pp. 921–922, fn. omitted.)

The Convention applies when one parent allegedly removes a child from, or retains a child away from, the country of the child's habitual residence. Cases applying the Convention have stated that it "leaves custodial decisions to the courts of the country of habitual residence" (*Abbott v. Abbott* (2010) 560 U.S. 1, 9 (*Abbott*)), that it " 'was meant, in part, to lend priority to the custody determination hailing from the child's state of habitual residence' " (*Miller, supra,* 240 F.3d at p. 399), or that it was meant " 'to "provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed" ' " (*Barzilay, supra,* 600 F.3d at pp. 916–917). These statements were made in the context of determining which country was the country of the child's habitual residence and which of competing custody orders would be given effect in determining whether removal and retention of the child was wrongful. They were not intended as a determination that, once a child lawfully changed its habitual residence, the new country of habitual residence could disregard an existing foreign custody and visitation order and impose its own order.

Father's argument seems to confuse determination of a child's state of habitual residence for purposes of the Convention with determination of jurisdiction of custody and visitation matters. A California court has jurisdiction to make an initial custody determination if California is the home state of the child on the date of commencement of the proceeding. (§ 3421.) " 'Home state' means the state in which a child lived with a parent … for at least six consecutive months immediately before the commencement of a child custody proceeding." (§ 3402, subd. (g).) It is undisputed the child was born in California and had lived in this state with both parents for more than two years at the time mother filed her dissolution petition and request to move to Italy with the child. Neither party has challenged the jurisdiction of this court to determine custody and visitation issues. The provision of the judgment that father challenges merely reflects an agreement that the jurisdiction of the California court will continue, "subject to provisions of California law, the Hague Convention and Italian law."

Contrary to father's suggestion, this is not a case in which the parties have attempted to "contractually determine their [child's] habitual residence" or to establish " 'artificial jurisdictional links' " to a country in which the child has never lived, "as a means to remove the child from the 'family and social environment in which its life has developed.' " (*Barzilay*, *supra*, 600 F.3d at pp. 920–921.) The child has always lived in California; the actual jurisdictional links to this state are clear.

Mother was effectively given a choice between agreeing that the California judgment, including its custody and visitation orders, would remain in effect after the move to Italy, and refusing that condition and being denied permission to move the child to Italy. By accepting the conditions set out in the judgment and moving with the child to Italy, mother essentially agrees that the California judgment will remain in effect and govern custody and visitation even after the move to Italy. If the child subsequently establishes habitual residence in Italy, and if any issues under the Convention subsequently arise, the court hearing the issue will presumably apply Italian law to determine whether the alleged removal or retention was wrongful. In doing so, it should take into account the existing California custody and visitation orders and honor its commitment under the Convention to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." (Convention, art. 1, subd. (b).) Consequently, we conclude the language father challenges, which appears in the statement of decision and the judgment, is not invalid on the ground it violates or is inconsistent with the Convention.

2. Enforcement of visitation rights

Father seems to argue that, because the Convention does not guarantee enforceability of the California custody and visitation order once the child becomes a habitual resident of another country, it was error for the trial court to permit mother's relocation with the child. He cites no authority establishing that enforceability of the

California order under the Convention must be guaranteed in order for relocation of the child to be allowed, and the California cases are to the contrary.

One of the objects of the Convention is "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." (Convention, art. 1, subd. (b).) " '[R]ights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." (Convention, art. 5, subd. (b).) The ICARA indicates "rights of access" means visitation rights. (22 U.S.C. § 9002(7).)

The Convention provides: "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention." (Convention, art. 2.) It requires contracting states to "designate a central authority to discharge the duties which are imposed by the Convention upon such authorities." (Convention, art. 6.) A parent may present to a central authority "[a]n application to make arrangements for organizing or securing the effective exercise of rights of access." (Convention, art. 21.)

> "The Central Authorities are bound … to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those right may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject." (Convention, art. 21.)

Thus, the Convention includes provisions requiring a contracting state to take steps to ensure that visitation rights established in another contracting state are respected and obstacles to exercise those rights are removed.

Father quotes a sentence from *Abbott* out of context, asserting it means the Convention is not a mechanism for enforcing visitation rights: "The Convention also recognizes 'rights of access,' but offers no *return remedy* for a breach of those rights."

(*Abbott*, *supra*, 560 U.S. at p. 9, italics added.) In context, it is clear *Abbott* was addressing the specific remedy of return of the child to the parent requesting the child's return.

> "The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must 'order the return of the child forthwith,' unless certain exceptions apply." (*Abbott*, *supra*, 560 U.S. at p. 9.) "The Convention also recognizes 'rights of access,' but offers no *return remedy* for a breach of those rights." (*Ibid*, italics added.)

This is consistent with the analysis of the United States Secretary of State, prior to ratification of the Convention by the United States:

> "Visitation rights are also protected by the Convention, but to a lesser extent than custody rights (Article 21). The remedies for breach of the 'access rights' of the non-custodial parent do not include the return remedy provided by Article 12. However, the non-custodial parent may apply to the Central Authority under Article 21 for 'organizing or securing the effective exercise of rights of access.' The Central Authority is to promote the peaceful enjoyment of these rights. The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visitation period. In this way the Convention seeks to address the major concern of a custodial parent about permitting a child to visit the non-custodial parent abroad." (Dept. of State, letter of submittal to the President, Oct. 4, 1985, reprinted at 51 Fed.Reg. 10494, appen. A (Mar. 26, 1986).)

Italy's Hague Convention Country Profile briefly describes the procedures for having a foreign custody and visitation order recognized and enforced in that country. Thus, father's suggestion that there are no means of enforcement of the custody and visitation order in Italy is without merit.

In *In re Marriage of Condon* (1998) 62 Cal.App.4th 533 (*Condon*), the mother was a native of Australia and the father was a United States citizen. (*Id*. at p. 536.) Their two children were born in Australia, but the family lived for several years in California. After an altercation with the father, the mother took the children to Australia without

informing the father. The father sought return of the children under the Convention, and the Australian court ordered that the children be returned to California forthwith. (*Id*. at pp. 537–538.) In subsequent dissolution proceedings in California, the trial court entered a custody and visitation order allowing the mother to move back to Australia with the children and granting the father visitation during school vacations. (*Id*. at pp. 539–540.) The father appealed. (*Id*. at p. 541.)

The court opined that, in addition to the factors that must be considered in determining whether a parent will be allowed to relocate with the child to another location within the United States, there were three other factors that should be considered when an international move was proposed: (1) differences in culture; (2) the distance of the move, including the expense of travel and whether allowing the move would be tantamount to terminating the noncustodial parent's visitation rights; and (3) possible lack of enforceability of California orders in other countries. (*Condon, supra,* 62 Cal.App.4th at pp. 546–547.) Regarding this third factor, the court stated:

> "Finally, before permitting any relocation which purports to maintain custody and visitation rights in the nonmoving parent, the trial court should take steps to insure its orders to that effect will remain enforceable throughout the minority of the affected children. Unless the law of the country where the children are to move guarantees enforceability of custody and visitation orders issued by American courts, *and there may be no such country*, the court will be required to use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court." (*Condon, supra*, 62 Cal.App.4th at pp. 547–548, italics added.)

Suggested methods of ensuring the moving parent will adhere to the custody and visitation order included: requiring the relocating parent to post a substantial bond that would be forfeited if the moving parent failed to comply with the order or sought modification in a foreign court; or terminating or reducing spousal or child support if the moving parent's actions frustrated the other parent's custody and visitation rights under

the California order and the foreign court would not enforce that order. (*Condon*, *supra*, 62 Cal.App.4th at p. 548.)

The *Condon* court concluded the trial court had addressed the first two of these factors. Regarding enforceability, however, it stated:

> "The trial court's order granting [the mother] the right to move away to Australia with the minor children assumed the Australian court would honor it during the minor children's entire period of minority. There is no question the trial court attempted to carefully balance all the competing factors in the present case in order to fashion an appropriate judgment and order. No matter how careful its judgment, however, … once [the mother] relocates to Australia, the California court has no way of guaranteeing its intricate order will be enforced by the foreign court." (*Condon*, *supra*, 62 Cal.App.4th at p. 554.)

After discussing multiple situations in which the Australian courts could refuse to enforce the California custody and visitation order or could exercise jurisdiction and make a new order (*Condon*, *supra*, 62 Cal.App.4th at p. 559), the court observed: "The trial court failed to evidence an understanding its custody order might not be enforced by the Australian courts.… An unenforceable order is no order at all and a custody order which is guaranteed enforceability for only 1 year of the remaining 10 to 12 years of minority represents an abuse of discretion by the issuing court. Such an order does not adequately protect the interests of this state's citizen, the father, in maintaining a relationship with his children, nor does it adequately preserve the policies this state's Legislature has declared should govern child custody arrangements."[2] (*Id*. at p. 561.) The court noted the mother had offered to concede the continuing jurisdiction of the

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[2] The reference to one-year enforceability apparently refers to article 12 of the Convention, which provides that, when a child has been wrongfully removed or retained, and proceedings for the child's return have been commenced within one year after the date of wrongful removal or retention, the authorities of the country where the child is located "shall order return of the child forthwith." If more than one year has passed, however, the authorities shall order return of the child, "unless it is demonstrated that the child is now settled in its new environment." (Convention, art. 12.)

California court. (*Ibid*.) It remanded the matter to the trial court, "to obtain a concession of jurisdiction and furthermore to create sanctions calculated to enforce that concession. At a minimum, such sanctions should include the posting of an adequate monetary bond within [the mother's] means and the potential forfeiture of all or some support payments upon proof [the mother] is disregarding essential terms of the court order or has violated the concession of jurisdiction by pursuing modification of the California order in the courts of Australia or any other nation." (*Id*. at p. 562.) The trial court was instructed to include these provisions in a revised order. (*Ibid*.)

In *In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, the parties were Israeli citizens who came to the United States on tourist visas and remained illegally after their expiration. (*Id*. at p. 1297.) They married and had a son. After they separated, the mother traveled to Israel with the child; because of her visa violation, she was not allowed to return and was barred from reentering the United States for 10 years. (*Ibid*.) The father filed for dissolution in California; the court granted the mother's request to relocate with the child to Israel. (*Id*. at pp. 1297–1298.)

Citing *Condon*, the court stated: "In cases involving international relocation, the child's best interests at a minimum require, first, continuing contact between the child and the parent remaining in this country, and, second, guaranteed enforceability of the California custody order in the foreign nation." (*In re Marriage of Abargil*, *supra*, 106 Cal.App.4th at p. 1299.) It found the trial court met the second requirement by taking steps to ensure the judgment would be enforceable in Israel. It ordered the mother to register the judgment and take any additional steps necessary to ensure implementation of the judgment in Israel, to file in the Israeli courts a stipulation consenting to California's continuing jurisdiction, and to post a bond to ensure her compliance. (*Id*. at p. 1300.) The court remanded the matter to the trial court, to make more specific orders regarding enforceability and to add a provision that, if the mother attempted to modify the judgment outside of California, in the trial court's discretion and absent a showing of good cause,

that attempt could be considered a violation of the California judgment and grounds for forfeiture of the bond and other sanctions. (*Id*. at pp. 1303–1304.)

In *J.M. v. G.H*. (2014) 228 Cal.App.4th 925, the mother, an Israeli citizen, and the father had a child in California. Both parties sought custody and visitation orders, and the mother sought permission to move with the child to Israel. (*Id*. at p. 928.) The trial court entered a judgment setting out the parties' custody and visitation rights. (*Id*. at p. 929.) The order required that the mother file a stipulation consenting to California's continuing jurisdiction and agreeing that she would seek modification of the custody order only in California. (*Id*. at p. 933.) The mother was also required to register the judgment with the Israeli court system. (*Id*. at pp. 933–934.) She was not required to post a bond because of her limited resources, but the order provided that, 15 days after the father filed a declaration stating that the mother had violated the custody order, he could deposit all child support into a trust account with the mother as beneficiary, to be used to pay for costs of litigation. (*Id*. at p. 934.)

The court affirmed the judgment. (*J.M. v. G.H*., *supra*, 228 Cal.App.4th at p. 940.) It rejected the father's contentions that the protections for international relocation were grossly inadequate and that the lack of a bond was fatal. (*Id*. at p. 934.) *Condon* referred to a bond "within the relocating parent's means," and the father did not challenge the finding that the mother lacked sufficient resources to acquire a bond. (*J.M. v. G.H*., *supra*, 228 Cal.App.4th at p. 34, italics omitted.) The provision for placing support payments into trust in the event of a violation of the custody order served the same purpose as a bond. (*Ibid*.)

Here, the judgment contained provisions similar to those used in *Condon*, *Abargil*, and *J.M. v. G.H.*, which were designed to ensure the custody and visitation provisions in the judgment would remain in effect after mother's move to Italy. Mother was required to have the judgment transcribed into Italian and registered in Italy prior to leaving the United States with the child. The judgment required that mother post and maintain a

bond in a specified amount. It recited that mother "indicated her agreement to this court's jurisdiction." Further, the judgment provided as an additional potential sanction for mother's failure to comply with the custody and visitation order, that father would be allowed to keep his child support payments in trust after filing a declaration asserting a violation of the order, and the court would retain jurisdiction over disposition of the funds.

We conclude the judgment contains adequate provisions to ensure the enforceability of the judgment after mother's relocation with the child. The trial court did not abuse its discretion by granting mother's request to move with the child to Italy.

D. Italian law

Father asserts mother "failed to prove Italy will recognize and enforce the trial court's orders." In support of this contention, father argues mother did not establish what the applicable Italian law is, because the law she submitted was translated into English by computer and was "gibberish."

First, father cites no authority establishing that a parent proposing to move with the child to another country bears the burden of proving that country will enforce the California judgment. In fact, California cases, such as *Condon*, recognize that a California court has no way of guaranteeing its custody and visitation order will be enforced by a foreign court; they have approved a parent's relocation with the child without such a guarantee, but with provisions for sanctions against the relocating parent if that parent fails to comply with the California judgment or attempts to replace it with an order from a foreign court.

Second, father has not cited us to any Italian law submitted by mother and included in the appellate record that was improperly translated. The trial court's judgment is presumed correct, and the appellant must affirmatively demonstrate error. (*Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, 556–557.) The appellant "is obligated to refer us to the portions of the record supporting his or her

contentions on appeal." (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149.) " 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

In the trial court, mother filed a request for judicial notice, which sought judicial notice of at least one item of Italian law. The request stated that the documents of which judicial notice was requested were attached as exhibits to the declaration of mother's Italian counsel. The Italian counsel's declaration and the exhibits purportedly attached were not included in the record on appeal. Father seems to concede these documents are missing from the record. When exhibits are missing from the appellate record, "we will not presume they would undermine the judgment." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.) Father has failed to provide a record adequate for meaningful review of this contention; he has failed to establish any insufficiencies in the presentation of Italian law, or that any such insufficiencies constituted reversible error.

DISPOSITION

The judgment is affirmed. Mother is entitled to her costs on appeal.

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HILL, P.J.

WE CONCUR:

_____
LEVY, J.

_____
DETJEN, J.